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## Madsen v. Women's Health Center, Inc.: The Constitutionality of Abortion Clinic Buffer Zones

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## NOTE

### *MADSEN V. WOMEN'S HEALTH CENTER, INC.:* THE CONSTITUTIONALITY OF ABORTION CLINIC BUFFER ZONES

The camera focuses on a woman who faces the clinic and, hands cupped over her mouth, shouts the following: "God's judgment is on you, and if you don't repent, He will strike you dead. The baby's blood flowed over your hands . . . . An innocent little child, a little boy, a little girl, is being destroyed right now." Cheering is audible from the clinic grounds. A second person shouts "You are responsible for the deaths of children . . . . You are a murderer . . . ." The first woman says "We will be everywhere . . . . There will be no peace and no rest for the wicked . . . . I pray that you will give them dreams and nightmares, God."<sup>1</sup>

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1. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2536-37 (1994) (per Rehnquist, C.J., joined by Blackmun, O'Connor, Souter & Ginsburg, JJ.; per Souter, J., concurring; per Stevens, J., concurring in part and dissenting in part; per Scalia, J., concurring in part and dissenting in part, joined by Kennedy & Thomas, JJ.) (quoting Justice Scalia's description of part of a videotape entered into the trial court record containing footage of demonstrations at the Florida abortion clinic, Aware Woman Center for Choice).

## I. INTRODUCTION

In *Madsen v. Women's Health Ctr., Inc.*,<sup>2</sup> the United States Supreme Court considered whether an injunction restricting anti-abortion demonstrations outside a Florida abortion clinic unconstitutionally infringed upon protesters' First Amendment rights.<sup>3</sup> The decision upheld the injunction's key provision, a thirty-six foot "buffer zone" surrounding the clinic, but struck down other provisions.<sup>4</sup>

Although abortion has been legal since 1973,<sup>5</sup> anti-abortion opponents have been active in recent years, picketing and demonstrating extensively at clinics across the country. Rather than enduring continued disruption and distress, some of these clinics have sought injunctions to neutralize the protest areas.<sup>6</sup>

Trial courts have often responded by issuing injunctions creating "buffer zones"<sup>7</sup> outside of clinics.<sup>8</sup> In assessing the constitutionality of these injunctions, reviewing courts have generally applied the traditional, intermediate standard used for analyzing content-neutral injunctions and ordinances.<sup>9</sup>

2. 114 S. Ct. 2516 (1994).

3. *Madsen*, 114 S. Ct. at 2521. U.S. CONST. amend I provides, in part, that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . . ."

4. *Madsen*, 114 S. Ct. at 2521.

5. See *Roe v. Wade*, 410 U.S. 113 (1973) (holding that women have a qualified right to obtain abortions).

6. See *infra* note 8 for a list of cases.

7. "Buffer zones" are areas surrounding abortion clinic property lines, usually defined by a number of feet, in which protesters are prohibited from entering or demonstrating. See *Madsen*, 114 S. Ct. at 2522.

8. See, e.g., *Northeast Women's Ctr., Inc. v. McMonagle*, 939 F.2d 57 (3d Cir. 1991) (sustaining injunction prohibiting all but six pickets within 500 feet of clinic); *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988) (sustaining 12 and 1/2 foot "free zone" around clinic entrance); *Pro-Choice Network of Western N.Y. v. Project Rescue*, 799 F. Supp. 1417 (W.D.N.Y. 1992) (imposing 15-foot "clear zone" around clinic entrances and people and vehicles seeking access thereto); *Planned Parenthood v. Holy Angels Catholic Church*, 765 F. Supp. 617 (N.D. Cal. 1991) (establishing "no protest" zone within 25 feet of clinic entrance); *Planned Parenthood v. Williams*, 873 P.2d 1224 (Cal. 1994) (sustaining injunction banning protesters from public sidewalk outside clinic); *Fargo Women's Health Org., Inc. v. Lambs of Christ*, 502 N.W. 2d 536 (N.D. 1992) (sustaining injunction providing 100-foot "protected zone" around clinic).

9. First Amendment activity is subject to different levels of protection depend-

*Madsen*, however, set precedent by developing a new, stricter standard to apply when evaluating content-neutral injunctions in a First Amendment context.<sup>10</sup>

This note will discuss the new standard introduced by the United States Supreme Court, the Court's rationale behind its introduction, and the standard's application to the facts of *Madsen*.<sup>11</sup> Next, the author will explore how this standard will influence the decisions and injunctions already implemented by state courts and how the standard may result in reduced protection for women's reproductive rights.<sup>12</sup> Finally, the author will explain why the states' interest in protecting clinic access is strong enough to justify the continued use of buffer zones despite the stricter standard courts must apply.<sup>13</sup>

## II. FACTS AND PROCEDURAL HISTORY

Women's Health Center, Inc., operates abortion clinics throughout central Florida. One of these clinics, the Aware Woman Center for Choice (hereinafter "the Clinic"), became the site of extensive anti-abortion protests and demonstrations.<sup>14</sup> In September 1992, a Florida state court permanently

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ing on where the activity occurs. See *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37 (1983). If it occurs in a traditional public forum, such as public streets, sidewalks, or parks, then the government cannot deny *all* access to such areas for the purpose of expressing First Amendment rights. *Id.* However, the government may regulate speech-related conduct in a public forum by establishing content-neutral time, place and manner regulations subject to intermediate scrutiny. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939).

First Amendment rights in a non-public forum, however, are subject to less protection and are analyzed under minimal scrutiny. See *Perry*, 460 U.S. at 37. Regulations affecting the time, place and manner of conduct will be upheld if they are viewpoint neutral and reasonably related to a legitimate government purpose. See, e.g., *International Soc'y of Krishna Consciousness v. Lee*, 112 S. Ct. 2701 (1992) (holding that airport terminals are not public forums); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (holding that a city bus is not a public forum).

10. *Madsen*, 114 S. Ct. at 2524-25. See *infra* notes 51-62 and accompanying text for new standard.

11. See *infra* notes 40-103 and accompanying text.

12. See *infra* notes 151-168 and accompanying text.

13. See *infra* notes 169-182 and accompanying text.

14. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2521 (1994). Women's Health Center described these demonstrations as "a sustained effort by

enjoined anti-abortion protesters from interfering with public access to the Clinic and from physically abusing persons entering or exiting it.<sup>15</sup>

Despite the court order, protesters continued to interfere with Clinic access, discouraged potential patients from entering the Clinic, and adversely affected the physical health of Clinic patients.<sup>16</sup> Therefore, six months after its issuance, Women's Health Center sought to broaden the injunction.<sup>17</sup>

The state court granted a broader injunction, finding that protesters had disobeyed the initial order by continuing to block Clinic access.<sup>18</sup> Specifically, the court found that protest-

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anti-abortion forces to shut down the only women's health clinic in Brevard County, Florida, the Aware Woman Center for Choice in Melbourne." Respondent's Brief at 1, *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516 (1994) (No. 93-880). According to Women's Health Center, this campaign against Aware Woman Center and other central Florida abortion clinics began in 1991 when Rescue America sent out leaflets announcing the arrival of Operation Rescue—National in central Florida. *Id.* at 1 (citing the full Record on Appeal at 9-10). A temporary injunction was issued in 1991, after activities at the Clinic became too disruptive to Clinic employees and patients, and a permanent injunction was issued in September 1992. *Id.*

15. *Madsen*, 114 S. Ct. at 2521. The issuance of the permanent injunction was based upon trial court findings that:

[The Protesters] are individuals and organizations, acting in concert, who have planned a nationwide campaign which they call "OPERATION RESCUE" . . . directed towards closing down abortion clinics and providers throughout the country . . . [and that the Petitioner Ed Martin had] stated an intent to prevent persons from having abortions in the Brevard and Seminole County areas by blocking access to the clinics.

Respondent's Brief at 1-2, *Madsen* (No. 93-880) (citing Joint Appendix at 6-7). The trial court further found that Martin had issued a press release announcing an 'Operation Rescue' for central Florida. *Id.* at 2 n.2 (citing Joint Appendix at 7).

Women's Health Center asserted that, although the protesters attempted to distance themselves from Operation Rescue by denying that they are members of the organization, the record is not in question. *Id.* at 2.

16. *Madsen*, 114 S. Ct. at 2521. Women's Health Center observed that, not only did protesters fail to obey the permanent injunction, but that activity against the Clinic actually escalated after the September 1992 court order. Respondent's Brief at 2, *Madsen* (No. 93-880). In the months following, the Clinic was attacked with butyric acid, the Clinic doors were sealed with super glue, a Clinic doctor received threats including a mock shooting, false statements were made against the medical staff, and focused residential picketing against Clinic staff continued. *Id.* at 3 (citing Joint Appendix at 54, 191, 215, 246-47, 498).

17. *Madsen*, 114 S. Ct. at 2521.

18. *Id.* Women's Health Center emphasized the deliberate nature of the

ers had congregated on the paved portion of the street leading to the Clinic, marched in front of Clinic driveways, and slowed cars approaching the Clinic by standing in their path, approaching the cars, and attempting to give the occupants anti-abortion literature.<sup>19</sup> The number of protesters varied, ranging from a few to four hundred.<sup>20</sup> The noise level also varied; it included everything from singing and chanting to the use of loudspeakers and bullhorns.<sup>21</sup>

The state court found that the demonstrations were adversely affecting the health of Clinic patients.<sup>22</sup> A Clinic doctor testified that Clinic patients confronted by aggressive protesters were exposed to increased medical risks.<sup>23</sup> The doctor explained that such patients “manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedure, thereby increasing the risk associated with such procedures.”<sup>24</sup> Noise from demonstrations was audible inside the Clinic and stressed patients both during surgical procedures and in the recovery room.<sup>25</sup> Some patients even delayed their medical treatment by turning away from the Clinic to avoid the protesters entirely.<sup>26</sup> The doctor further testified to the health risks associated with such delays.<sup>27</sup>

Clinic doctors and workers were targeted at their homes as

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protesters' activities: “Throughout the rest of 1992, the Rescue America newsletter, written by Petitioners Martin and Madsen . . . continued to urge ‘rescue’ activity, which was defined in this publication: The term rescue refers to blockikng [sic] access to the entrance of abortion clinics . . . . In most cases, the clinic is shut for the day. Many appointments do not reschedule.” Respondent’s Brief at 2-3, *Madsen* (No. 93-880) (citing Joint Appendix at 109, 413-15).

19. *Madsen*, 114 S. Ct. at 2521.

20. *Id.*

21. *Id.* Respondents described the situation at the Clinic as having become so desperate that the local police captain testified that “enforcement of the injunction would help the police maintain public order and safety . . . and that a neutral zone would be helpful to the situation.” Respondent’s Brief at 8, *Madsen* (No. 93-880) (citing Joint Appendix at 260, 299).

22. *Madsen*, 114 S. Ct. at 2521.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Madsen*, 114 S. Ct. at 2521.

well.<sup>28</sup> Protesters picketed in front of Clinic employees' residences, informed neighbors that the employees were "baby killers," shouted at passersby, and even confronted the children of Clinic employees who were home alone.<sup>29</sup>

The protesters' behavior led the state court to amend its prior order, enjoining a broader range of protest activities.<sup>30</sup> The provisions of the amended injunction prohibited protesters<sup>31</sup> at all times and on all days from 1) blocking access to or from any Clinic building or parking lot, 2) demonstrating or entering within thirty-six feet of the property line of the Clinic,<sup>32</sup> 3) physically approaching any person within three hundred feet of the Clinic who seeks Clinic services and does not indicate a desire to communicate, 4) demonstrating or picketing within three hundred feet of Clinic employees' residences, and 5) singing, chanting, using sound amplification equipment or making other sounds or images observable within earshot of patients inside the Clinic during the hours of 7:30 a.m. through noon, Monday through Saturday, during surgical and

28. *Id.*

29. *Id.* One Clinic nurse, a single mother of three daughters, quit her job because she and her children were the targets of residential picketing. Respondent's Brief at 6, *Madsen*, (No. 93-880) (citing Joint Appendix at 492-521). Although she eventually returned to work, she moved residences after a group of 15 protesters stood outside her home while two activists outside her door accosted her daughters and urged them to convince their mother to stop working at the Clinic and to "stop killing babies." *Id.* One of the children, crying, called her mother at work; the mother raced home to find "three terrified little girls." *Id.* (citing Joint Appendix at 505-7). The nurse moved shortly thereafter because she felt her family "needed to find a safe place that provided some sense of security, someplace if they did find us that at least it would not be invisible to the public." *Id.* at 7 n.10 (citing Joint Appendix at 506).

30. *Madsen*, 114 S. Ct. at 2521. The state court concluded that "its original injunction had proven insufficient 'to protect the health, safety, and rights of women in Brevard and Seminole County, Florida, and surrounding counties seeking access to [medical and counseling] services.'" *Id.*

31. The injunction was directed at petitioners, as well as "Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and . . . Bruce Cadle, Pat Mahoney, Randall Terry . . . and all persons acting in concert or participation with them, or on their behalf." *Madsen*, 114 S. Ct. at 2521 n.1.

32. An exception to the 36-foot buffer zone was the area immediately adjacent to the Clinic on the east; protesters had to remain at least five feet from the Clinic's east line. Another exception related to the record title owners of the property to the north and west of the Clinic. *Madsen*, 114 S. Ct. at 2522 (citing *Operation Rescue v. Women's Health Ctr., Inc.*, 626 So. 2d 664, 669-70 (Fla. 1993)).

recovery periods.<sup>33</sup>

The Florida Supreme Court upheld the constitutionality of the amended injunction.<sup>34</sup> The court found that the injunction was content-neutral and accordingly, applied intermediate scrutiny, concluding that the restrictions were “narrowly tailored to serve a significant government interest, and [left] open ample alternative channels of communication.”<sup>35</sup> Shortly before the Florida Supreme Court announced its opinion, however, the United States Court of Appeals for the Eleventh Circuit heard a separate challenge to the same injunction and struck it down.<sup>36</sup>

The Eleventh Circuit determined that the injunction was content-based and accordingly, applied strict scrutiny, holding that the restrictions were neither necessary to serve a compelling governmental interest, nor narrowly tailored to achieve that end.<sup>37</sup> The Eleventh Circuit found that public safety and order were adequately served by existing laws without having to infringe upon the First Amendment freedoms of others.<sup>38</sup>

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33. *Madsen*, 114 S. Ct. at 2522-23. Other provisions of the injunction, uncontested by the protesters, prohibited them at all times and on all days from: 1) entering the premises and property of the Aware Woman Center for Choice, 2) physically abusing persons entering or leaving the Clinic, 3) intimidating or physically abusing any former or present Clinic doctor or worker, and 4) encouraging or inciting other persons to commit the prohibited acts. *Id.* at 2522.

34. *Id.* at 2521 (citing *Operation Rescue*, 626 So. 2d at 664).

35. *Id.* at 2522-23 (citing *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983)). Prior to *Madsen*, content-neutral injunctions were analyzed under intermediate scrutiny, the same level of scrutiny applied to content-neutral regulations. This standards demands that the injunctions be narrowly tailored to serve significant governmental interests and leave open ample alternative means of communication. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (upholding content-neutral time, place, and manner regulation prohibiting sleeping in public park to protest homelessness).

Content-based injunctions and regulations are analyzed under strict scrutiny, requiring that they be necessary to serve compelling governmental interests and “narrowly drawn to achieve that end.” See *Perry*, 460 U.S. at 45.

36. *Madsen*, 114 S. Ct. at 2523. See *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993).

37. *Cheffer*, 6 F.3d at 711 (citing *Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (striking down content-based ban prohibiting all residential picketing except labor disputes)). The Eleventh Circuit characterized the dispute as a clash “between an actual prohibition of speech and a potential hinderance to the free exercise of abortion rights.” *Id.* at 711.

38. *Madsen*, 114 S. Ct. at 2523 (citing *Cheffer*, 6 F.3d at 711).



The United States Supreme Court granted certiorari to resolve the conflict between the Florida Supreme Court and the Eleventh Circuit Court of Appeals regarding the constitutionality of the state court's amended injunction.<sup>39</sup>

### III. THE COURT'S ANALYSIS

#### A. THE INJUNCTION IS CONTENT-NEUTRAL

The *Madsen* Court<sup>40</sup> began its analysis by asking whether the injunction was content and viewpoint neutral, for the answer dictated the appropriate level of scrutiny.<sup>41</sup> The protesters contended that, because the injunction restricted the behavior of only anti-abortion protesters, it was necessarily content-based, and thus deserved the strictest scrutiny.<sup>42</sup> The *Madsen* Court rejected this argument, however, finding that the injunction targeted only the conduct, not the content, of anti-abortion protests.<sup>43</sup>

The *Madsen* Court explained that content-neutrality is determined by asking whether the government has adopted

39. *Id.*

40. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516 (1994).

41. *Madsen*, 114 S. Ct. at 2523. The guarantees of the First Amendment provide that: "[G]overnment has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Nonetheless, government may regulate the time, place, and manner of speech, provided that the regulations are not based upon the content or subject matter of the speech. *See Consolidated Edison Co. of New York v. Public Serv. Comm'n of New York*, 447 U.S. 530, 535-36 (1980); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). Thus, when a time, place, and manner regulation is facially content-based, the government must show that the restriction is justified without reference to the content of the regulated speech. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Because content-based regulations present risks that the government may suppress certain ideas or discriminate on the basis of beliefs, content-based regulations are subject to strict scrutiny. Content-neutral regulations, by contrast, do not present risks of governmental discrimination and thus, are subject to the less-protective intermediate scrutiny standard. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

42. *Madsen*, 114 S. Ct. at 2523 (citing *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983)).

43. *Id.* The *Madsen* Court stated: "There is no suggestion in the record that Florida law would not equally restrain similar conduct directed at a target having nothing to do with abortion; none of the restrictions imposed by the court were directed at the content of petitioner's message." *Id.*

speech regulation “without reference to the content of the regulated speech.”<sup>44</sup> The government’s purpose is the primary consideration.<sup>45</sup> Here, the Court found that the state court imposed the amended injunction because the protesters repeatedly violated the court’s original order, not because of any invidious discrimination on the part of the ordering court.<sup>46</sup> The injunction did not apply to pro-choice advocates because they did not engage in disruptive demonstrations for which relief was requested.<sup>47</sup> The Court noted that to hold otherwise would render virtually all injunctions content-based.<sup>48</sup>

Thus, the restrictions imposed upon the protesters were *incidental* to their anti-abortion message, not *because of* their anti-abortion message. Motives, thoughts, and ideology were irrelevant in determining if the injunction applied to one’s behavior; engaging in activities prohibited by the injunction was the critical factor.<sup>49</sup> Accordingly, the *Madsen* Court concluded that the injunction was not content or viewpoint based, and thus, refused to apply strict scrutiny.<sup>50</sup> The Court then

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44. *Madsen*, 114 S. Ct. at 2523 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (upholding content-neutral noise regulations)).

45. *Id.*

46. *Id.* at 2524. The *Madsen* Court stated:

That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group whose conduct violated the court’s order happen to share the same opinion regarding abortions being performed at the clinic. In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based.

*Id.*

47. *Id.*

48. *Id.* The Court elaborated:

An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group. It does so, however, because of the group’s past actions in the context of a specific dispute between real parties. The parties seeking the injunction assert a violation of their rights; the court hearing the action is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public.

*Id.* at 2523.

49. *Madsen*, 114 S.Ct. at 2523. See Respondent’s Brief at 18, *Madsen v. Women’s Health Ctr., Inc.*, 114 S. Ct. 2516 (1994) (No. 93-880).

50. *Madsen*, 114 S. Ct. at 2523-24. The Court also rejected a prior restraint

went on to discuss the applicable standard.

## B. NEW STANDARD APPLICABLE TO SPEECH-RESTRICTIVE INJUNCTIONS

Intermediate scrutiny is the standard generally used to assess the constitutionality of content-neutral statutes or ordinances.<sup>51</sup> This standard asks whether a regulation is "narrowly tailored to serve a significant governmental interest" and leaves open adequate alternative means of communication.<sup>52</sup> Because the area outside the Clinic is a traditional public forum,<sup>53</sup> the *Madsen* Court determined that intermediate scruti-

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analysis urged by the protesters. *Id.* at 2524. Although prior restraints, which come to the court with a heavy presumption of unconstitutionality, often take the form of injunctions, not all injunctions which incidentally affect expression are prior restraints. *Id.* The Court found that here, the injunction was not issued because of the content of the protesters' expression, nor were the protesters prevented from expressing their message in a variety of ways; they were only prohibited from expressing it within the 36-foot buffer zone. *Id.* Thus, the Court found prior restraint analysis unnecessary. *Id.* at 2524 n.2. *But See* *New York Times Co. v. United States*, 403 U.S. 713 (1971) (striking down as prior restraint a ban on publication of "The Pentagon Papers").

51. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2524 (1994).

52. *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (applying intermediate scrutiny to uphold noise regulation)). *See also* *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (applying intermediate scrutiny to uphold restrictions prohibiting sleeping in a public park to protest homelessness); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981) (applying intermediate scrutiny to uphold time, place, and manner restrictions regarding the sale of literature and solicitation of funds at a state fair).

53. *See* *Hague v. CIO*, 307 U.S. 496 (1939) (holding that public sidewalks are quintessential traditional public forums). First Amendment activity is subject to different levels of protection depending on where the activity occurs. *See* *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37 (1983). If it occurs in a traditional public forum, such as public streets, sidewalks, or parks, then the government cannot deny *all* access to such areas for the purpose of expressing First Amendment rights. *Id.* However, the government may regulate speech-related conduct in a public forum by establishing content-neutral time, place and manner regulations subject to intermediate scrutiny. *See, e.g.,* *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939).

First Amendment rights in a non-public forum, however, are subject to less protection and are analyzed under minimal scrutiny. *See* *Perry*, 460 U.S. at 37. Regulations affecting the time, place and manner of conduct will be upheld if they are viewpoint neutral and reasonably related to a legitimate government purpose. *See, e.g.,* *International Soc'y of Krishna Consciousness v. Lee*, 112 S. Ct. 2701 (1992) (holding that airport terminals are not public forums); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (holding that a city bus is not a public fo-

ny would be appropriate if the regulation at issue were a content-neutral statute.<sup>54</sup> The Court, however, was faced with a content-neutral injunctive order.

Although courts have traditionally analyzed injunctions and statutes under the same standard, the *Madsen* majority decided that injunctions in a First Amendment context require a higher degree of scrutiny than that used for generally-applicable statutes.<sup>55</sup> Therefore, the Court created a new, more demanding standard to apply when assessing the constitutionality of speech-restrictive injunctions.<sup>56</sup>

The Court justified this stricter standard by explaining the differences between injunctions and ordinances.<sup>57</sup> Whereas ordinances are passed by legislatures and are imposed indiscriminately upon the public as a whole, injunctions are issued upon identified groups of wrongdoers, and thus carry "greater risks of censorship and discriminatory application than do general ordinances."<sup>58</sup> The Court concluded that this risk justified a "somewhat more stringent application of general First Amendment principles in this context."<sup>59</sup>

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54. *Madsen*, 114 S. Ct. at 2524.

55. *Id.* at 2524-25.

56. *See id.* at 2525.

57. *Id.* at 2524 ("Ordinances represent a legislative choice regarding the promotion of particular societal interests. Injunctions, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree.").

58. *Id.* (finding that "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally") (quoting *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949)).

59. *Madsen*, 114 S. Ct. at 2524. The majority acknowledged that Justice Stevens and Justice Scalia disagreed with the new standard, but asserted that "consideration of *all* of the differences and similarities between statutes and injunctions supports, as a matter of policy, the standard we apply here." *Id.* at 2525. *See infra* notes 104-08 and accompanying text for the standard Justice Stevens would apply. *See infra* notes 124-36 and accompanying text for the standard Justice Scalia would apply.

The majority rejected Justice Scalia's argument that precedent compelled the application of strict scrutiny. The majority asserted that they knew of no case, nor did Justice Scalia cite any case, in which strict scrutiny was applied to a content-neutral injunction. *Id.*

The majority also disagreed with Justice Scalia's contention that the cases cited by the majority supporting their new standard actually advocate strict scrutiny. *Id.* Specifically, Justice Scalia believed that the standard adopted in *Carroll v.*

The Court described the new standard as more rigorous than intermediate scrutiny, but not as stringent as strict scrutiny.<sup>60</sup> Rather than merely requiring that an injunction be narrowly tailored to serve a significant state interest, the new standard demands that "provisions of the injunction burden no more speech than necessary to serve a significant government interest."<sup>61</sup> This level of scrutiny requires more precise tailoring than intermediate scrutiny.<sup>62</sup>

### C. SIGNIFICANT STATE INTERESTS EXIST

Having articulated the new standard for injunctions, the *Madsen* Court proceeded to apply it to the case at hand. Before examining the individual injunction provisions, however, the Court identified and evaluated the proposed state interests. The *Madsen* Court agreed with the Florida Supreme Court's determination that the injunction promoted a number of significant state interests.<sup>63</sup> The injunction served the strong state interest in "protecting a woman's freedom to seek lawful medical or counseling services in connection with her

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President and Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968) is strict scrutiny, which he felt "does not remotely resemble the Court's new proposal." *Madsen*, 114 S. Ct. at 2542 (Scalia, J., concurring in part and dissenting in part). While *Carroll* requires that an injunction be "couched in the narrowest terms that will accomplish the pin-pointed objective" of the injunction, the new standard requires that an injunction "burden no more speech than necessary" to accomplish its goals. *Id.* at 2526. The majority "fail[ed] to see a difference between the two standards." *Id.*

60. *Madsen*, 114 S. Ct. at 2525.

61. *Id.* at 2525 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967)). The Court explained that this standard is consistent with the principle that injunctions be no broader than necessary to achieve their desired goals:

Our close attention to the fit between the objectives of an injunction and the restrictions it imposes on speech is consistent with the general rule, quite apart from First Amendment considerations, "that injunctive relief should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs."

*Madsen*, 114 S. Ct. at 2525 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

62. *Madsen*, 114 S. Ct. at 2525-26.

63. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2526 (1994).

pregnancy.”<sup>64</sup> The injunction also furthered the state’s interest in securing public safety, promoting the free flow of traffic on public streets and sidewalks, and protecting citizens’ property rights.<sup>65</sup>

Lastly, the Court acknowledged that the governmental interest in residential privacy extends to medical privacy as well.<sup>66</sup> The Court agreed with the Florida Supreme Court’s finding: “While targeted picketing of the home threatens the psychological well-being of the ‘captive’ resident, targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held ‘captive’ by medical circumstance.”<sup>67</sup> The *Madsen* Court concluded that a combination of these state interests clearly justified an “appropriately tailored” injunction.<sup>68</sup> The Court then proceeded to examine each contested injunction provision, determining whether it “burden[ed] more speech than necessary to accomplish its goal.”<sup>69</sup>

#### D. DO THE INJUNCTION PROVISIONS “BURDEN MORE SPEECH THAN NECESSARY” TO ACCOMPLISH THEIR GOALS?

##### 1. *The Thirty-Six Foot Buffer Zone*

The thirty-six foot buffer zone prohibited protesters from “congregating, picketing, patrolling, demonstrating or entering” any part of the public or private property within 36 feet of the clinic’s property line.”<sup>70</sup> In effect, this provision required the protesters to move from the Clinic driveway to the opposite

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64. *Id.* See *Roe v. Wade*, 410 U.S. 113 (1973).

65. *Madsen*, 114 S. Ct. at 2526 (citing *Operation Rescue v. Women’s Health Ctr., Inc.*, 626 So. 2d 664, 672 (Fla. 1993)).

66. *Id.* See *Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding ban on targeted residential picketing).

67. *Madsen*, 114 S. Ct. at 2526 (citing *Operation Rescue*, 626 So. 2d at 673). See *Abortion Clinic Violence: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 1st and 2nd Sess., 1, 3, 130 (1987) (medical staff at clinics testifying before Congress about how psychological stress from aggressive anti-abortion demonstrations complicates medical treatment and compromises patients’ subsequent recovery).

68. *Madsen*, 114 S. Ct. at 2526.

69. *Id.*

70. *Madsen v. Women’s Health Ctr., Inc.*, 114 S. Ct. 2516, 2526 (1994) (citing *Operation Rescue*, 626 So. 2d at 669).

side of the street.<sup>71</sup>

The majority found that "[t]he 36-foot buffer zone protecting the entrances to the clinic and the parking lot is a means of protecting unfettered ingress to and egress from the clinic, and ensuring that [the protesters] do not block traffic . . . ."<sup>72</sup> The Court noted that, due to the narrow confines surrounding the Clinic, the trial court faced limited options to protect safe access to the building.<sup>73</sup> Because the protesters disobeyed the first injunction by interfering with such access, the state court decided that the protesters should not remain on the Clinic sidewalk or driveway, nor should they be allowed to stand in the middle of the street blocking traffic.<sup>74</sup>

The *Madsen* Court noted that the buffer zone did not eliminate all avenues of communication near the Clinic. Protesters could still get as close as ten to twelve feet to cars approaching the Clinic, and even from across the street, protesters could be seen and heard by people in the Clinic parking lots.<sup>75</sup> The *Madsen* majority concluded that, in light of the continuing need to maintain Clinic access and the protesters' failure to follow the first court order, the thirty-six foot buffer zone "burdened no more speech than necessary" to accomplish the

71. *Id.* See *Cameron v. Johnson*, 390 U.S. 611 (1968) (sustaining statute prohibiting picketers from obstructing or unreasonably interfering with access to and from public buildings, including courthouses, and with traffic on adjacent street sidewalks).

72. *Madsen*, 114 S. Ct. at 2527.

73. *Id.* The Florida Supreme Court had observed that the street is only 21 feet wide in the area of the Clinic. *Id.* The *Madsen* Court found that "[t]he state court was convinced that allowing the petitioners to remain on the clinic's sidewalk and driveway was not a viable option in view of the failure of the first injunction to protect access." *Id.*

74. *Id.* ("We also bear in mind the fact that the state court originally issued a much narrower injunction, providing no buffer zone, and that this order did not succeed in protecting access to the clinic. The failure of this first order to accomplish its purpose may be taken into consideration in evaluating the constitutionality of the broader order.") (citing *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 697-98 (1978)).

The *Madsen* Court conceded that "[t]he need for a complete buffer zone near the clinic entrances and driveway may be debatable," but explained that "some deference must be given to the state court's familiarity with the facts. . . ." *Madsen*, 114 S. Ct. at 2527 (citing *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 294 (1941)).

75. *Madsen*, 114 S. Ct. at 2527.

state's goals.<sup>76</sup>

Nonetheless, the Court struck down part of the thirty-six foot buffer zone provision that applied to private property to the north and west of the Clinic.<sup>77</sup> The Court found that the patients and staff need not cross this area of private property to access the Clinic, nor was there evidence that the protesters' activities on the private property obstructed access to the Clinic or blocked vehicular traffic on the street.<sup>78</sup> Because the purpose of the buffer zone was to protect Clinic entrances and promote the free flow of traffic in front of the Clinic, the *Madsen* Court held that this part of the provision burdened more speech than necessary.<sup>79</sup>

## 2. *The Noise Level and "Images Observable" Provision*

Next, the *Madsen* Court discussed the "noise level"<sup>80</sup> and "images observable" provision.<sup>81</sup> In assessing the reasonableness of such injunction provisions, the Court found it necessary to consider the nature of the place to which the restrictions applied.<sup>82</sup> Relying on its opinion in *NLRB v. Baptist Hospital*,

76. *Id.* The majority disagreed with Justice Scalia's reliance on the videotape to show that no factual findings existed supporting the second injunction: "[T]he state court was . . . not limited to Justice Scalia's rendition of what he saw on the videotape to make its findings in support of the second injunction." *Id.* The majority pointed out that witnesses testified as to the relevant facts in a three-day evidentiary hearing and the protesters themselves "studiously refrained from challenging the factual basis for the injunction both in the state courts and here." *Id.* Thus, the majority found Justice Scalia's contention that no factual basis supported the injunction to be without merit. *Id.*

77. *Id.* at 2528.

78. *Id.*

79. *Madsen*, 114 S. Ct. at 2528.

80. For other cases limiting noise that interferes with the rights of unwilling listeners, see *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Grayned v. Rockford*, 408 U.S. 104 (1972); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

81. This provision restricts protesters from "singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sound or images observable to or within earshot of patients inside the [c]linic during the hours of 7:30 a.m. through noon on Mondays through Saturdays." *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2528 (1994) (citing *Operation Rescue v. Women's Health Ctr., Inc.*, 626 So. 2d 664, 669 (Fla. 1993)).

82. *Madsen*, 114 S. Ct. at 2528 ("[T]he nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations . . . that are reasonable.'" (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972))).



*Inc.*,<sup>83</sup> the Court acknowledged that medical facilities serve the needs of ailing patients who particularly require an environment of peace and quiet.<sup>84</sup> Because noise control at medical facilities is crucial during surgery and recovery periods, the majority concluded that the noise-level provision, which applied only during these critical periods, withstood a First Amendment challenge.<sup>85</sup>

The *Madsen* Court overturned the blanket ban on all "images observable," however.<sup>86</sup> The Court reasoned that if this provision was intended to prevent signs threatening to the patients or their families, the trial court could have issued a narrower restriction prohibiting threatening signs, instead of the broad ban issued here.<sup>87</sup> The Court also found that the images observable prohibition was not justified by the necessity of reducing stress and anxiety of persons inside the Clinic.<sup>88</sup> Because the Clinic could simply close its curtains, the Court concluded that the restriction burdened more speech than necessary.<sup>89</sup>

### 3. *The Three Hundred Foot No-Approach Zone*

The *Madsen* Court also struck down the provision requiring protesters to refrain from physically approaching persons seeking Clinic services within three hundred feet of the Clinic "unless such person indicates a desire to communicate."<sup>90</sup> Al-

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83. 442 U.S. 773 (1979). The *Madsen* Court stated:

Hospitals, after all are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principle facets of the day's activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere.

*Madsen*, 114 S. Ct. at 2528 (quoting *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 783-84 n.12 (1979) (quoting *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 509 (1978)).

84. *Madsen*, 114 S. Ct. at 2528.

85. *Id.*

86. *Id.* at 2528-29.

87. *See id.* at 2529. *See supra* note 81 for prohibited conduct.

88. *Madsen*, 114 S. Ct. at 2529.

89. *Id.*

90. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2529 (1994) (quoting *Operation Rescue v. Women's Health Ctr., Inc.*, 626 So. 2d 664, 669 (Fla.

though the purpose of this provision was to prevent patients and staff from being “stalked” or “shadowed” while approaching the Clinic,<sup>91</sup> the Court held that the provision was too broad to serve these goals.<sup>92</sup> Peaceful, as well as aggressive, approaches were prohibited.<sup>93</sup> Absent evidence that the protesters’ speech was independently proscribable (i.e., “fighting words,” threats, or words fused with violence), the Court found this prohibition to violate the First Amendment.<sup>94</sup> In fact, the *Madsen* Court felt that the “consent” requirement alone invalidated the provision, as it burdened more speech than necessary to ensure Clinic access and prevent intimidation.<sup>95</sup>

#### 4. *The Residential Picketing Ban*

The last substantive provision challenged by protesters was the restriction against “picketing, demonstrating, or using sound amplification equipment within 300 feet of the residences of clinic staff.”<sup>96</sup> The Court overturned the sound amplification prohibition, concluding that the state may simply order protesters to reduce the volume if it proves too disruptive to the neighborhood.<sup>97</sup> The Court further rejected the three hundred foot residential picketing ban,<sup>98</sup> finding it overbroad:

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1993)).

91. *Id.* See *International Soc’y for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2708 (1992) (“[F]ace-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation.”).

92. *Madsen*, 114 S. Ct. at 2529.

93. *Id.*

94. *Id.* (“[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.”) (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988)).

95. *Madsen*, 114 S. Ct. at 2529.

96. *Madsen v. Women’s Health Ctr., Inc.*, 114 S. Ct. 2516, 2529 (1994).

97. *Id.* (citing *Grayned v. Rockford*, 408 U.S. 104, 116 (1972) (upholding time, place, and manner noise restriction near a school)).

98. *Id.* at 2530 (citing *Frisby v. Shultz*, 487 U.S. 474 (1988) (upholding law banning targeted residential picketing)). In *Frisby*, the Court characterized the home as “the last citadel of the tired, the weary, and the sick.” *Frisby*, 487 U.S. at 484 (quoting *Gregory v. Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring)).

The *Madsen* Court distinguished the ban in *Frisby* on the ground that it

"[T]he 300-foot zone would ban 'general marching through residential neighborhoods, or even walking a route in front of an entire block of houses.'"<sup>99</sup>

#### E. CONCLUSION OF THE MAJORITY

The *Madsen* majority sustained the constitutionality of the Clinic's thirty-six foot buffer zone and the noise-level provision, finding that they burdened no more speech than necessary to serve the injunction's goals.<sup>100</sup> However, the Court struck down the thirty-six foot buffer zone as applied to the private property north and west of the Clinic, the 'images observable' provision, the three hundred foot no-approach zone around the Clinic, and the three hundred foot buffer zone around residences.<sup>101</sup> The Court found that these provisions "[swept] more broadly than necessary" to protect the state's interests.<sup>102</sup> Thus, the judgment of the Florida Supreme Court was affirmed in part and reversed in part.<sup>103</sup>

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was much smaller than the 300-foot zone struck down here and was limited to "focused picketing taking place solely in front of a particular residence." *Madsen*, 114 S. Ct. at 2530 (quoting *Frisby*, 487 U.S. at 483).

99. *Madsen*, 114 S. Ct. at 2530 (quoting *Frisby*, 487 U.S. at 483). The *Madsen* Court reasoned: "The record before us does not contain sufficient justification for this broad ban on picketing; it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result." *Id.*

100. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2530 (1994).

101. *Id.* The majority also rejected the protesters' challenge that the injunction was vague and overbroad because it applied to those acting "in concert" with the named defendants. *Id.* Because petitioners were named parties, the Court found that they lacked standing to challenge the part of the order concerning those who were not named parties. *Id.* The Court also found that the phrase, "in concert," was not overbroad because it did not prohibit conduct or chill speech, but was merely directed at unnamed parties who might later be found to be "in concert" with named parties. *Id.* See *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945) (holding that a party subject to an injunction who was not a "successor or assign" could not invalidate the order because it applied to "successors or assigns" of the enjoined party).

The Court further rejected the argument that the "in concert" provision violated protesters' First Amendment freedom of association, explaining that such a freedom does not extend to joining with others in order to deprive third parties of their lawful rights. *Madsen*, 114 S. Ct. at 2530. See *Citizens Against Rent Control/Coalition For Fair Housing v. Berkeley*, 454 U.S. 290 (1981) (holding that governmental limitations on contributions to support or oppose referendum elections violates the freedoms of speech and association).

102. *Madsen*, 114 S. Ct. at 2530.

103. *Id.* Justice Souter wrote a short concurring opinion to clarify two matters

#### IV. JUSTICE STEVENS CONCURRING IN PART AND DISSENTING IN PART

Justice Stevens dissented from the majority concerning two main issues.<sup>104</sup> First, he disagreed with the majority's new standard. Although Justice Stevens agreed that intermediate scrutiny was inappropriate for reviewing a First Amendment challenge to an injunction, he asserted that injunctive relief should be entitled to a more lenient, not a more rigorous, standard.<sup>105</sup> Justice Stevens reasoned that, because injunctions only apply to individuals who have already engaged in illegal conduct and are likely to repeat the offensive behavior, courts need the latitude of a lenient standard to fashion injunctive remedies which will protect against repeated violations.<sup>106</sup>

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in the record. First, he explained that the trial judge made it clear that the issue of who had been acting "in concert" with the named defendants was a matter to be "taken up in individual cases, and not to be decided on the basis of protesters' viewpoints." *Id.* Second, Justice Souter pointed out that the protesters themselves "acknowledge that the governmental interests in protection of public safety and order, of the free flow of traffic, and of property rights are reflected in Florida law." *Id.* at 2530-31.

104. In addition to his two main points of disagreement, Justice Stevens also objected to the fact that the majority addressed challenges to the injunction that were not properly before the Court. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2533 (1994). The certiorari petition presented three questions for review: the first asked whether the 36-foot buffer zone was an unconstitutional content-based restriction, the second asked whether the 300-foot buffer zone consent requirement provision was a reasonable time, place and manner restriction, or whether it was an unconstitutional prior restraint, and the third question asked whether the "in concert" provision violated the First Amendment. *Id.* at 2531 n.1.

Because the protesters only asserted a content-based challenge to the 36-foot buffer zone, Justice Stevens felt the majority was wrong to modify the scope of that zone, which was not an issue before the Court. *Id.* at 2533-34. Specifically, Justice Stevens felt the Court should not have struck down the portion of the zone on the north and west sides of the Clinic which the protesters did not even challenge in their briefs. Justice Stevens believed that the Court should also have refrained from deciding the constitutionality of the noise restrictions and "images observables" provision, as neither of those issues were presented by the certiorari questions. *Id.* at 2533-34.

105. *Madsen*, 114 S. Ct. at 2531.

106. *Id.* ("[E]ven when an injunction impinges on constitutional rights, more than a 'simple proscription against the precise conduct previously pursued' may be required; the remedy must include appropriate restraints on 'future activities both to avoid a recurrence of the violation and to eliminate its consequences.'") (quoting *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 697-98 (1978)).

Justice Stevens explained that ordinances require stricter scrutiny than injunctions because legislation is imposed upon an entire community, regardless of individual culpability.<sup>107</sup> Thus, according to Justice Stevens, a thirty-six foot buffer zone that applied to an entire community would be much more likely to violate the First Amendment than an injunctive buffer zone that applied only to those previously engaged in unlawful conduct.<sup>108</sup>

Justice Stevens' second point of contention with the majority concerned the three hundred foot buffer zone. Justice Stevens concluded that the majority incorrectly struck down the buffer zone prohibiting protesters from physically approaching patients unless they indicated a desire to communicate.<sup>109</sup> Specifically, the provision provided that protesters "shall not accompany . . . encircle, surround, harass, threaten, or physically or verbally abuse those individuals who choose not to communicate with them."<sup>110</sup>

Justice Stevens characterized the three hundred foot buffer zone as a prohibition on a species of conduct, not a prohibition on speech.<sup>111</sup> He stated that the protesters misread this provision as creating a "no-speech" zone in which they were prohibited from speaking absent consent from listeners.<sup>112</sup> To the contrary, Justice Stevens found that the protesters were free to communicate with the public provided they did not

107. *Id.*

108. *Madsen*, 114 S. Ct. at 2531 ("The judicial remedy for a proven violation of law will often include commands that the law does not impose upon the community at large.") (quoting *Teachers v. Hudson*, 475 U.S. 292, 309-10 (1986)). *Id.* at 2531-32.

109. *Id.* at 2532.

110. *Id.* at 2532 n.4.

111. *Id.* at 2532. Justice Stevens elaborated on his reasoning:

Petitioners' "counseling" of the clinic's patients is a form of expression analogous to labor picketing. It is a mixture of conduct and communication . . . . Just as it protects picketing, the First Amendment protects the speaker's right to offer "sidewalk counseling" to all passersby. That protection, however, does not encompass attempts to abuse an unreceptive or captive audience, at least under the circumstances of this case.

*Id.* at 2532-33.

112. *Madsen*, 114 S. Ct. at 2532.

conduct themselves in an aggressive way: "As long as [the protesters] do not physically approach patients in this manner, they remain free not only to communicate with the public but also to offer verbal or written advice on an individual basis to the clinic's patients through their 'sidewalk counseling.'" <sup>113</sup>

Because he concluded that the buffer zone prohibited only conduct while allowing a considerable amount of speech, Justice Stevens found the provision no broader than necessary to serve the important state goals of reducing anxiety and hypertension in patients approaching the Clinic.<sup>114</sup> He therefore would have upheld the three hundred foot zone around the Clinic against the protesters' First Amendment challenge.<sup>115</sup>

## V. JUSTICE SCALIA CONCURRING IN PART AND DISSENTING IN PART

### A. THE PROTESTERS ENGAGED IN PROTECTED FIRST AMENDMENT ACTIVITY

Justice Scalia concurred in the judgment in part but emphasized his points of disagreement in a lengthy and vigorous dissent.<sup>116</sup> Justice Scalia began by attacking the majority's fairness; he asserted that the abortion aspect of this case had precluded the majority from engaging in an unbiased analysis of the legal issues.<sup>117</sup> Because Justice Scalia found the thirty-six foot buffer zone to be "profoundly at odds with our First

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113. *Id.*

114. *Id.* at 2533.

115. *Id.*

116. See *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2534-51 (1994) (Scalia, J., concurring in part and dissenting in part, joined by Kennedy and Thomas, JJ.).

117. *Id.* at 2535. Justice Scalia quoted Justice O'Connor's language from another abortion-related case:

This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulations of abortion.

(quoting Justice O'Connor's dissent in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986)).

Amendment precedents and traditions," he reasoned that it was upheld only because of the majority's ad hoc, result-oriented analysis.<sup>118</sup> This biased analysis, argued Justice Scalia, claimed the First Amendment as its victim.<sup>119</sup>

Justice Scalia proceeded to describe a videotape entered into the trial record by the Clinic containing footage of the demonstrations.<sup>120</sup> Presuming that the tape revealed the most aggressive activity justifying the injunction, Justice Scalia concluded that the tape supported the protesters' case more than the Clinic's.<sup>121</sup> He described the video as displaying a wide range of First Amendment activity, expressed by both pro-life and pro-choice activists.<sup>122</sup> Justice Scalia emphasized, however, that the video failed to provide evidence of violence near the Clinic or attempts to prevent access to and

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118. *Madsen*, 114 S. Ct. at 2535. Justice Scalia asserted: "The entire injunction in this case departs so far from the established course of our jurisprudence that in any other context it would have been regarded as a candidate for summary reversal." *Id.* at 2534. Justice Scalia went on to explain the main reasons behind his dissent:

Because I believe that the judicial creation of a 36-foot zone in which only a particular group, which has broken no law, cannot exercise its rights of speech, assembly, and association, and the judicial enactment of a noise prohibition, applicable to that group and that group alone, are profoundly at odds with out First Amendment precedents and traditions, I dissent.

*Id.* at 2535.

119. *See id.* ("Today the ad hoc nullification machine claims its latest, greatest, and most surprising victim: the First Amendment.").

120. *Madsen*, 114 S. Ct. at 2535-37. Justice Scalia explained that the videotape was shot by employees and volunteers at the Aware Woman Clinic on three Saturdays in February and March of 1993, that the camera location appears to have been an upper floor of the Clinic, and that the tape was edited down from approximately 6-8 hours to 1/2 an hour. *Id.* at 2535.

121. *Id.*

122. *Id.* According to Justice Scalia, the First Amendment activity displayed on the videotape included:

[S]inging, chanting, praying, shouting, the playing of music both from the clinic and from handheld boom boxes, speeches, peaceful picketing, communication of familiar political messages, handbilling, persuasive speech directed at opposing groups on the issue of abortion, efforts to persuade individuals not to have abortions, personal testimony, interviews with the press, and media efforts to report on the protest.

*Id.*

from the Clinic.<sup>123</sup>

## B. STRICT SCRUTINY IS THE APPROPRIATE STANDARD FOR SPEECH-RESTRICTIVE INJUNCTIONS

Justice Scalia next took issue with the new standard announced by the majority.<sup>124</sup> Although he agreed that different standards should govern ordinances as opposed to injunctions, Justice Scalia asserted that injunctions deserve an even stricter standard than that imposed by the majority.<sup>125</sup> Justice Scalia went so far as to state that strict scrutiny was the appropriate standard.<sup>126</sup>

Justice Scalia proposed three specific reasons why injunctions challenged on First Amendment grounds should receive strict scrutiny. First, injunctions are susceptible to misuse by judges favoring one side of a dispute and suppressing ideas of the other side.<sup>127</sup> Second, individual judges, rather than legislatures, should not be trusted to impose injunctions, often on those who have previously disobeyed the judge's order.<sup>128</sup> Third, injunctions are procedurally more difficult to challenge than ordinances.<sup>129</sup>

123. *Madsen*, 114 S. Ct. at 2535.

124. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2537-38 (1994) (Scalia, J., concurring in part and dissenting in part, joined by Kennedy and Thomas, JJ.).

125. *Id.* at 2538. Justice Scalia felt that the majority's new standard, although it purports to be stricter than intermediate scrutiny, is actually little different than intermediate scrutiny. Justice Scalia stated: "The Court does not give this new standard a name, but perhaps we could call it intermediate-intermediate scrutiny. The difference between it and intermediate scrutiny . . . is frankly too subtle for me to describe." *Id.*

126. *Id.*

127. *Id.* Justice Scalia gave the example of a judge who enjoins picketing at a labor dispute site. The judge knows he is enjoining the expression of pro-union views and thus, his personal bias may be reflected in his court order. Unless it is content-based, general legislation does not similarly target one side of a dispute or another. *Id.* at 2538-39.

128. *Madsen*, 114 S. Ct. at 2539. Justice Scalia recognized that speech-restricting injunctions "are the product of individual judges rather than legislatures—and often of judges who have been chagrined by prior disobedience of their orders. The right to free speech should not lightly be placed within the control of a single man or woman." *Id.*

129. *Id.* at 2538. Justice Scalia explained that the collateral bar rule of *Walker v. Birmingham*, 388 U.S. 307 (1967), eliminated the defense that the injunction



Justice Scalia stated that the majority asked the wrong question in devising its new standard:

The real question in this case is not whether intermediate scrutiny, which the Court assumes to be some kind of default standard, should be supplemented because of the distinctive characteristics of injunctions; but rather whether those distinctive characteristics are not, for reasons of both policy and precedent, fully as good as "content-basis" for demanding strict scrutiny.<sup>130</sup>

As Justice Scalia explained, the dangers of censorship and discrimination which require content-based legislation to pass strict scrutiny are equally prevalent in injunctive orders; injunctions, therefore, deserve the same level of scrutiny.<sup>131</sup>

Although Justice Scalia would apply strict scrutiny to injunctions which are not content-based,<sup>132</sup> he believed the injunction here actually was content-based.<sup>133</sup> Justice Scalia saw the injunction as discriminatory on the basis of beliefs because it applied to "all persons acting in concert or participation with [the named individuals and organizations], or on their behalf."<sup>134</sup> Thus, he therefore viewed this clause as evidence that the injunction applied not just to conduct, but to viewpoints and ideas as well.<sup>135</sup> According to Justice Scalia,

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itself was unconstitutional. *Madsen*, 114 S. Ct. at 2539. Therefore, if people feel that an injunction imposed upon them is unconstitutional, they must first challenge the injunction in court; if they disregard it, they are prohibited from later claiming in a contempt proceeding that their First Amendment rights were violated. *Id.* Thus, individuals lacking the resources to appeal an injunction must remain silent and forgo their freedom of speech rights, for if they ignore the injunction and speak, their First Amendment rights are no longer a defense. *Id.*

130. *Madsen*, 114 S. Ct. at 2538.

131. *Id.*

132. *Id.* at 2539.

133. *Id.* In fact, Justice Scalia found the injunction to be viewpoint-based as well because the injunction only targeted people with a particular viewpoint - those opposed to abortion. *Id.*

134. *Id.*

135. *Madsen*, 114 S. Ct. at 2539. Justice Scalia further supported his position by providing an account of an April 1993 hearing before the trial judge issuing the injunction. The hearing concerned a number of arrests made for walking within the 36-foot buffer zone and contained the following exchanges:

Mr. Lacy: "I was wondering how we can—why we were arrested and confined as being in concert with these

even the issuing judge construed the “acting in concert or participation” provision to pertain to “all those who wish to express the same views as the named defendants.”<sup>136</sup>

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people that we don't know, when other people weren't, that were in that same buffer zone, and it was kind of selective as to who was picked and who was arrested and who was obtained for the same buffer zone in the same public injunction.”

The Court: “Mr. Lacy, I understand that those on the other side of the issue [abortion-rights supporters] were also in the area. If you are referring to them, the Injunction did not pertain to those on the other side of the issue, because *the word in concert means those in concert with those who had taken a certain position in respect to the clinic, adverse to the clinic. If you are saying that is the selective basis that the pro-choice were not arrested when pro-life was arrested, that's the basis of selection.*”

And John Doe No. 16 “ . . . I also understand that the reason why I was arrested was because I acted in concert with those who were demonstrating pro-life. I guess the question that I'm asking is were the beliefs in ideologies of the people that were present, were those taken into consideration when we were arrested? . . . *When you issued the Injunction did you determine that it would only apply to - that it would apply only to people that were demonstrating that were pro-life?*”

The Court: “*In effect, yes.*”

*Madsen*, 114 S. Ct. at 2540 (citing Trans. 104-05, 113-116 (Apr. 12, 1993 Appearance Hearings Held Before Judge McGregor, Eighteenth Judicial Circuit, Seminole County, Florida)).

136. *Madsen*, 114 S. Ct. at 2539-40. Justice Scalia also disagreed with the majority's dismissal of prior restraint analysis for the injunction. Justice Scalia asserted that “an injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint.” *Id.* at 2541. Justice Scalia pointed out that just last Term, Chief Justice Rehnquist wrote for the Court: “The term prior restraint is used ‘to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur’. . . . [P]ermanent injunctions, i.e.,—court orders that actually forbid speech activities—are classic examples of prior restraints.” *Id.* (quoting *Alexander v. United States*, 113 S. Ct. 2766 (1993)) (quoting M. Nimmer, *Nimmer on Freedom of Speech* § 4.03, p. 4-14 (1984) (emphasis added in *Alexander*)).

In *Madsen*, the majority concluded that the injunction was not a prior restraint because it only restrained speech in a certain area and the basis for its issuance was not content but prior unlawful conduct. *See id.* at 2524 n.2. Justice Scalia felt these distinctions had no basis in precedent. *See id.* at 2541.

## C. EVEN UNDER THE MAJORITY'S NEW STANDARD, ALL INJUNCTION PROVISIONS FAIL

Even applying the majority's standard, Justice Scalia found the injunction offensive to the First Amendment.<sup>137</sup> He explained the circumstances under which injunctions are issued: "[U]nder general equity principles, an injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law."<sup>138</sup> Because Justice Scalia found that the trial record lacked factual findings that protesters engaged in behavior violative of the original injunction,<sup>139</sup> he determined that the amended injunction should never have been issued.<sup>140</sup> Justice Scalia thereby concluded that the amended injunction necessarily burdened considerably more speech than necessary.<sup>141</sup>

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137. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2544 (1994).

138. *Id.* (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

139. *Id.* According to Justice Scalia, the majority accepted, without adequate proof, the fact that the protesters violated the original injunction. Justice Scalia stated:

The Court simply takes this on faith—even though violation of the original injunction is an essential part of the reasoning whereby it approves portions of the amended injunction, even though petitioners denied any violation of the original injunction, even though the utter lack of proper basis for the other challenged portions of the injunction hardly inspires confidence that the lower courts knew what they were doing, and even though close examination of the factual basis for essential conclusions is the usual practice in First Amendment cases.

*Id.* at 2545.

140. *Madsen*, 114 S. Ct. at 2548. Justice Scalia summed up his position as follows:

The interests assertedly protected by the supplementary injunction did not include any interest whose impairment was a violation of Florida law or of a Florida-court injunction. Unless the Court intends today to overturn long-settled jurisprudence, that means that the interests cannot possibly qualify as 'significant interests' under the Court's new standard.

*Id.*

141. *Id.* Justice Scalia found that the only behavior conceivably related to a violation of the original injunction included the incidental effects of persons walking in a picket line and leafletting on public property, behavior such as "causing traffic on the street in front of the abortion clinic to slow down, and causing vehicles crossing the pedestrian right-of-way, between the streets and the clinic's parking lot, to slow down or even, occasionally, to stop momentarily while pedestrians

Furthermore, Justice Scalia objected to the fact that the trial court failed to use less restrictive alternatives regarding the thirty-six foot buffer zone: "[T]here are surely a number of ways to protect [the state's] interests short of banishing the entire protest demonstration from the 36-foot zone."<sup>142</sup> Justice Scalia explained that the trial court could have ordered the demonstrators to stay out of the street, limited the number of protesters permitted on the Clinic side of the street, or forbidden pickets on driveways.<sup>143</sup> Moreover, he found the majority's rejection of these options to mock the requirement that restrictions "burden no more speech than necessary."<sup>144</sup>

Regarding the "no-noise-within-earshot-of-patients" provision, Justice Scalia asserted that the "First Amendment . . . reels in disbelief."<sup>145</sup> According to Justice Scalia, this provision is no more than a "judge-crafted abridgement of speech."<sup>146</sup> He argued that neither the majority nor the Florida Supreme Court ever attempted to link the "no noise" provision with any prior violation of law.<sup>147</sup> Because the trial record lacked evidence of the existence or violation of a law restricting noise near the Clinic, Justice Scalia found it impermissible for a single judge to impose his own self-created law against a limited class of social protesters.<sup>148</sup> Justice Scalia noted that the two cases<sup>149</sup> cited by the majority in support of the noise restriction were distinguishable because each involved restrictions of general application; they were imposed

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got out of the way." *Id.* at 2546. Justice Scalia felt that these results were not intentional and that the original injunction did not intend to prohibit such incidental effects. *Id.*

142. *Madsen*, 114 S. Ct. at 2548.

143. *Id.*

144. *Id.* at 2548-49. Justice Scalia complained that "[t]he Court's only response to these options is that '[t]he state court was convinced that [they would not work] in view of the failure of the first injunction to protect access' . . . . If the 'burden no more speech than necessary' requirement can be avoided by merely opining that (for some reason) no lesser restriction than *this* one will be obeyed, it is not much of a requirement at all." *Id.*

145. *Id.* at 2547.

146. *Id.*

147. *Madsen*, 114 S. Ct. at 2547.

148. *Id.*

149. See *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773 (1979) (upholding generally-applicable noise restriction near a hospital); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (upholding a generally-applicable noise ordinance).

upon the public at large, not upon an isolated class of protesters.<sup>150</sup>

## VI. A CALIFORNIA CASE VACATED AND REMANDED IN LIGHT OF *MADSEN*

Because the *Madsen* standard acts as a federal mandate on courts nationwide, injunctions reviewed under the former, intermediate standard may no longer be valid under the new, stricter standard. The United States Supreme Court has recently vacated and remanded a number of state court decisions involving injunctions at abortion clinics.<sup>151</sup> One of these vacated decisions is *Planned Parenthood v. Williams*.<sup>152</sup>

In *Williams*, the California Supreme Court upheld an injunction prohibiting protesters from demonstrating on a public sidewalk in front of the abortion clinic.<sup>153</sup> Protesters were therefore limited to demonstrating across the street, which is where the thirty-six foot buffer zone in *Madsen* left the Florida protesters.<sup>154</sup>

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150. *Madsen*, 114 S. Ct. at 2547. Justice Scalia concluded his dissent by lamenting the injustice engendered by the majority's decision and describing the errors in its opinion:

The proposition that injunctions against speech are subject to a standard indistinguishable from (unless perhaps more lenient in its application than) the "intermediate scrutiny" standard we have used for "time, place, and manner" legislative restrictions; the notion that injunctions against speech need not be closely tied to any violation of law, but may simply implement sound social policy; and the practice of accepting trial-court conclusions permitting injunctions without considering whether those conclusions are supported by any findings of fact—these latest by-products of our abortion jurisprudence ought to give all friends of liberty great concern.

*Id.* at 2549-50.

151. Scott Graham, *Abortion 'Buffer Zone' Ruling is Struck Down*, THE RECORD-ER, Nov. 1, 1994, at 1. See, e.g., *Lawson v. Murray*, 130 L. Ed. 2d 6 (1994), *vacating and remanding Murray v. Lawson*, 624 A.2d 3 (N.J. Super. Ct. App. Div. 1993).

152. 873 P.2d 1224 (Cal. 1994).

153. *Id.* at 1226.

154. The two cases are similar in other respects as well. In *Williams*, the California Supreme Court rejected the protesters' contention that the injunction was content-based, giving the same reasoning and precedent found in the *Madsen* opinion. See *id.* at 1229-30. The *Williams* court also identified similar governmental

The *Williams* court found that the injunction was content-neutral and accordingly applied the traditional, intermediate standard appropriate for time, place, and manner regulations.<sup>155</sup> The California Supreme Court concluded, as did the Florida Supreme Court when it analyzed the injunction involved in the *Madsen* case, that the injunction was narrowly tailored to protect significant state interests and left open ample alternative avenues of communication.<sup>156</sup> Nonetheless, because the California Supreme Court used the intermediate standard rather than the "burden no more speech than necessary" standard, the decision was vacated by the United States Supreme Court and now must be reconsidered in light of *Madsen*.<sup>157</sup>

The sidewalk exclusion in *Williams* is similar to the thirty-six foot buffer zone upheld in *Madsen*; thus, the California Supreme Court may find the facts in *Madsen* analogous to *Williams* and reaffirm the injunction despite the tougher standard it must apply. However, one of the main issues in *Williams* revolved around the "narrowly tailored" requirement. The protesters, as well as the dissenting opinion, urged that the sidewalk exclusion was broader than necessary to serve the state's goals.<sup>158</sup> The majority disagreed that such precise tailoring was necessary, relying heavily on *Ward v. Rock Against Racism*.<sup>159</sup> *Ward* held that narrow tailoring is not synonymous with least restrictive means: "So long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."<sup>160</sup> Contrary to *Ward*, *Madsen's* new standard requires that injunctions "burden no more speech than necessary," implying that if a less-speech restrictive alternative

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interests as those held in *Madsen* to justify the restriction. *Id.* at 1231-33.

155. *Id.* at 1229.

156. *Williams*, 873 P.2d at 1233-36. The *Madsen* case was titled *Operation Rescue v. Women's Health Ctr., Inc.*, 626 So. 2d 664 (Fla. 1993), when it was before the Florida Supreme Court.

157. *Williams v. Planned Parenthood*, 115 S. Ct. 413 (1994).

158. *Williams*, 873 P.2d at 1235, 1243-45.

159. *Id.* at 124. See *Ward*, 491 U.S. 781 (1989).

160. *Williams*, 873 P.2d at 1233 (citing *Ward*, 491 U.S. at 797, 800).

exists, failure to use it would, by definition, "burden more speech than necessary."<sup>161</sup> Thus, *Madsen* seems to suggest that the holding in *Ward* no longer applies to speech restrictive injunctions.

Furthermore, the *Williams* court explained that intermediate scrutiny does not require "quibbling over a few feet."<sup>162</sup> The *Madsen* Court, on the other hand, emphasized that the new standard's goal is "precision of regulation," requiring that an injunction be "couched in the narrowest terms that will accomplish its pin-pointed objective."<sup>163</sup> Such language indicates that the *Madsen* Court takes the narrowly tailored requirement very seriously; loose-fitting regulations or even any overbroadness appear impermissible under the new standard.

Because the flexibility depended on in *Williams* has since been eroded by *Madsen's* more rigorous standard,<sup>164</sup> and because *Williams* was a close case with a strong dissenting opinion,<sup>165</sup> *Williams* will have difficulty withstanding a stricter level of scrutiny. Nonetheless, *Madsen* has thus far only been applied to its own facts. It is hard to predict exactly how lower courts will interpret the new standard for injunctions and how stringently they will apply it.

## VII. CRITIQUE

### A. THE NEW STANDARD HELPS PROTESTERS, HURTS ABORTION CLINICS

The standard announced by the United States Supreme Court in *Madsen* shifts the balance in favor of anti-abortion protesters by requiring that injunctions against them withstand a higher degree of scrutiny.<sup>166</sup> Although *Madsen* upheld the thirty-six foot buffer zone,<sup>167</sup> the standard the Court de-

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161. See *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2527 (1994).

162. *Williams*, 873 P.2d at 1235.

163. See *Madsen*, 114 S. Ct. at 2526 (discussing the standard applied in *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968)).

164. *Madsen*, 114 S. Ct. at 2525.

165. *Williams*, 873 P.2d at 1238-45 (Kennard, J., dissenting).

166. See *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2526 (1994).

167. *Madsen*, 114 S. Ct. at 2530.

veloped may portend trouble for other beleaguered abortion clinics. Such clinics will now have to make stronger showings of necessity in order to obtain or sustain protective injunctions. In close cases, such as *Williams*, clinics which received an injunction under the intermediate standard may lose the injunction when subjected to the new, stricter standard.<sup>168</sup> Consequently, women's reproductive rights may suffer.

While protesters benefit from the new standard, women's rights advocates, clinic doctors and workers, and those seeking clinic services have little to gain from this standard. Women risk losing their injunctions and facing harassment, embarrassment, and fear in order to exercise their constitutionally protected right to choose abortion.

#### B. THE NEW STANDARD IS APPROPRIATE FOR SPEECH-RESTRICTIVE INJUNCTIONS

Although the Court's new standard may prove more difficult for pro-choice advocates, the reasoning behind it is sound. The differences between statutes and injunctions support the conclusion that injunctions require their own standard.<sup>169</sup> Injunctions, imposed by individual judges instead of legislatures, carry greater dangers of discrimination and censorship.<sup>170</sup> Subjecting injunctions to a slightly higher level of scrutiny is therefore justified.

When injunctions infringe upon First Amendment activity, protesters' rights must be afforded higher degrees of protection. The First Amendment should take precedence, and incidental infringements on speech should be permitted only when and to the extent necessary to protect the states' interests. The new standard announced by the *Madsen* majority accomplishes this result; it allows courts to balance competing interests while prohibiting them from unnecessarily abridging

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168. See *Madsen*, 114 S. Ct. at 2526-30.

169. See *supra* note 57 for a discussion regarding the differences between injunctions and ordinances.

170. See *supra* notes 58-59 and accompanying text for a discussion regarding the dangers of injunctions.



protesters' First Amendment rights.<sup>171</sup>

### C. THE NEED TO PROTECT ABORTION CLINIC ACCESS IS INCREASING

Although protesters' rights deserve protection, the states' interest in protecting clinic access should not be underestimated. Abortion, like free speech, is a constitutionally protected right.<sup>172</sup> Because pro-life protesters cannot lawfully prohibit abortions, they often resort to tactics of intimidation, threats, and even violence.<sup>173</sup> Increasingly, abortion clinics have become targets for bombings, fires,<sup>174</sup> and shootings,<sup>175</sup> resulting in lost lives and extensive property damage.

Unfortunately, for women seeking abortion related services, aggressive anti-abortion crusades have proven effective in hampering access to such services.<sup>176</sup> Recent statistics show that 84% of United States counties are now without abortion

171. See *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2523-26 (1994).

172. See *Roe v. Wade*, 410 U.S. 113 (1973).

173. The Senate Committee on Labor and Human Resources assembled the following evidence of clinic violence: "From 1977 to April 1993, more than 1,000 acts of violence and more than 6,000 clinic blockades against abortion providers were reported in the United States. Included were at least 327 clinic invasions, 131 death threats, 84 assaults, 81 arsons, 36 bombings, two kidnappings and one murder." Bruce Fein, *Free Speech Depends on the Speaker*, TEXAS LAWYER, July 25, 1994, at 24. Such clinic-related violence led to the enactment of federal legislation, the Freedom of Access to Clinic Entrances Act of 1994, (FACE). The statute subjects persons to federal penalties for interfering with access to abortion clinics. See 18 U.S.C.A. § 248 (1994).

174. Within the month of February 1995, six abortion clinics along the California coast suffered arson attacks. Dexter Waugh, *Feds link fires at 6 health clinics*, SAN FRANCISCO EXAMINER, Mar. 2, 1995, at A1. There have been a surge of attacks at clinics around the country, and the FBI is investigating the possibility of a national conspiracy against abortion clinic providers. *Id.* at A12.

175. On December 30, 1994, John Salvi killed two women and wounded at least five other people at two abortion clinics in Brookline, Massachusetts.

In 1993, Dr. David Gunn, a Florida physician who provided abortions, was shot and killed by Paul Hill, a man participating in anti-abortion demonstrations at the Pensacola Women's Health Clinic. Rohrer, *Doctor is Slain During Protest Over Abortions*, N.Y. TIMES, Mar. 11, 1993, at A1.

176. Fred Bayles, *Abortion foes put choice on the run*, SAN FRANCISCO EXAMINER, Jan. 7, 1995, at A1, A16. "Some 200 sites that provided abortion, mostly in smaller rural and public hospitals, have halted the procedure in the last four years in the face of the threat of violence, financial woes and political opposition." *Id.* at A1.

service providers.<sup>177</sup> Anti-abortion groups are largely responsible for this reduction, as well as for increasing costs for providers striving to keep services running.<sup>178</sup> Although rural communities are the hardest hit, metropolitan areas may soon feel an impact.<sup>179</sup>

#### D. BALANCING THE INTERESTS

Under the new standard announced by the *Madsen* court, evaluating the constitutionality of an injunction in the First Amendment context essentially becomes a balancing test; courts must balance whether a state's interest in protecting clinic access is "necessary" enough to justify incidental infringements upon protesters' First Amendment rights. The *Madsen* standard tipped the balance slightly in favor of protesters by allowing greater protection for their First Amendment rights.<sup>180</sup> On the other side of the scale, however, are abortion clinics, whose need for protection, already strong, is increasing.

Although the *Madsen* Court articulated and applied a stricter standard, the Court nonetheless sustained the thirty-six foot buffer zone, finding that the state interest in protecting clinic access was strong enough to overcome protesters' First Amendment rights.<sup>181</sup> Since *Madsen* was decided, the need to protect clinic access has grown even stronger.<sup>182</sup> The decrease in abortion service providers and increase in clinic related violence reveal the current vulnerability of abortion clinics. Although each case involving clinic access protection is ultimately fact-specific and must be judged on its own merits, these

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177. See *id.* at A1, A16.

178. *Id.* at A16. The president of National Women's Health Organization, operator of nine women's clinics in eight states, estimated that her organization had spent \$1 million in security and legal fees since the early 1980's: "Its been a state of siege for 10 to 12 years. The metropolitan areas are just realizing it now themselves." *Id.*

179. *Id.* Paul deParrie, editor of Life Advocate Magazine in Portland was eager to claim victory for these developments: "There is no doubt the pro-life side is winning . . . . The outlying communities have stopped doing abortions, and it allows us to concentrate on the hard-core abortion mills in the cities." *Id.*

180. See *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2523-26 (1994).

181. See *Madsen*, 114 S. Ct. at 2527.

182. See *supra* notes 173-79 and accompanying text.

factors should weigh in favor of abortion clinics when courts balance the competing interests, because they explain how necessary clinic protection has become.

The new standard makes it slightly more difficult for clinics to obtain and sustain injunctions; nonetheless, if courts properly acknowledge the continuing and increasing need for clinic protection, buffer zone regulations will generally remain constitutional despite the stricter standard courts must apply.

### VIII. CONCLUSION

In *Madsen v. Woman's Health Ctr., Inc.*,<sup>183</sup> the United States Supreme Court created a stricter standard for examining the constitutionality of content-neutral injunctions and applied that standard to sustain or strike down different provisions of the injunction.<sup>184</sup> The Court upheld the thirty-six foot buffer zone surrounding the Clinic and the noise restrictions, but overturned the "images observable" provision, the three hundred foot no-approach zone, the thirty-six foot buffer zone applied to the private property north and west of the Clinic, and the three hundred foot buffer zone around residences.<sup>185</sup>

Perhaps the Florida Supreme Court summed up the situation best when it stated:

While the First Amendment confers on each citizen a powerful right to express oneself, it gives the picketer no boon to jeopardize the health, safety, and rights of others. No citizen has a right to insert a foot in the hospital or clinic door and insist on being heard—while purposely blocking the door to those in genuine need of medical services. No picketer can force speech into the captive ear of the unwilling and disabled.<sup>186</sup>

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183. 114 S. Ct. 2516 (1994).

184. See *supra* notes 40-103 and accompanying text.

185. *Madsen*, 114 S. Ct. at 2530.

186. *Operation Rescue v. Women's Health Ctr., Inc.*, 626 So. 2d 664, 675 (Fla. 1993).

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The importance of the First Amendment remains undisputed; its fundamental guarantees of free speech and assembly are the cornerstone of our democratic society. Nonetheless, when “free speech” is used as a weapon to prevent others from exercising *their* constitutional rights, appropriately tailored injunctions can provide an essential tool in restoring rights to their proper balance.

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